UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/722
21 November 1995

ORIGINAL: ENGLISH

Judgement No. 722

Case No. 814: KNIGHT ET AL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas at the request of Fabiola Knight, Lucia Carrasco-Battin, Margaret Cullimore, Wilga Evans, Cynthia Irish, Bepty Laurencon, Beverley Mallinson, Anna McAlpine-Nunez, Friedda M. Radovic, Emma Rana, Grace Ann Simonetti, Lena Yacoumopoulou, and Pamela Zapata, staff members of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 July 1994;

Whereas, on 28 July 1994, the Applicants filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 October 1994, the Applicants, after making the necessary corrections, again filed an application requesting the Tribunal:

> "7. [To recognize] their right to be considered for promotion to the Professional category on the basis of equity and merit. ... in accordance with the 'Charter of the United

Nations, the Staff Regulations and Rules and the relevant records.' [And] to rescind the Respondent's decision ... not to consider the Applicants for promotion to the Professional category.

8. [To recognize]:

(a) That the denial by the Respondent to consider the candidature of the Applicants on the assertion that 'there is still only one system in place for moving from the General Service to the Professional category, namely: the G to P examination ... was illegal ...

(b) That ... it also resulted in de facto discrimination on the basis of sex. ...

(c) That the preclusion of some of the Applicants who are citizens of countries where National Competitive Exams have been held from participating in those exams constitutes illegal discrimination.

(d) That accordingly, the Applicants are entitled to compete and be considered by the relevant promotion bodies for professional posts from the P-1 to the P-3 levels on an equal footing and on the basis of merit with other candidates, external or internal.

9. ... to decide on payment to the Applicants for salaries lost due to the non-progression of their careers owing to the illegal decision of the Respondent."

Whereas the Respondent filed his answer on 17 March 1995;

Whereas the Applicants filed written observations on 30 September 1995;

Whereas, on 16 October 1995, the Respondent submitted comments on the Applicants' written observations;

Whereas, on 17 October 1995, the Applicant Radovic submitted observations on her files;

Whereas, on 23 October and 2 November 1995, the Respondent submitted further comments on the Applicants' written observations;

Whereas, on 2 November 1995, the Tribunal put a question to the Respondent, to which he provided an answer on 3 November 1995;

Whereas, on 16 November 1995, the Applicants submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicants are staff members of the United Nations in the General Service category who sought entry into the Professional category. The Applicants' length of service with the United Nations varies from 15 to 35 years. Their performance evaluation reports range from "very good" to "excellent".

Eleven of the Applicants, in 1990, wrote to the Assistant Secretary-General for Human Resources Management, expressing concern regarding their prospects for promotion. In response, the Assistant Secretary-General for Human Resources Management advised them that while many staff members in the General Service category merit consideration for promotion to the Professional category, there was only one system for moving from one category to the other.

On 30 December 1991, the Applicant Yacoumopoulou applied for a P-3 post. In a memorandum dated 26 February 1992, the Assistant Secretary-General for Human Resources Management advised her that General Assembly resolution 33/143 required all movement from the General Service to the Professional category to be by competitive examination and that "there is to be no exception to this procedure". On 10 April 1992, she requested the Secretary-General to review this decision.

On 9 March 1992, the Applicant Zapata applied for two Public Information posts. In a memorandum dated 20 March 1992, the Director, Recruitment and Placement Division, advised her that General Assembly resolution 33/143 required all movement from the General Service to the Professional category to be by competitive

examination. On 9 April 1992, she requested review of this decision and asked for direct submission of her appeal to the Administrative Tribunal. In a letter dated 23 July 1992, the Director, Staff Administration and Training Division, Office of Human Resources Management, advised her that the decision would be maintained.

On 24 July 1992, the Applicants lodged an appeal with the JAB, seeking "recognition of their rights to be considered for promotion to the Professional category on the basis of equity, irrespective of the type of promotion system applicable". At the time of their appeal to the Joint Appeals Board (JAB), the Applicants Yacoumopoulou and Zapata were at the G-6 level, and the other Applicants were at the G-7 level. Since then, the Applicant Yacoumopoulou has been promoted to the P-2 level. The Applicants Irish, Rana and Evans have retired. The Applicant Cullimore has separated from service pursuant to an agreed termination.

On 20 January 1994, the JAB adopted its report. Its considerations and recommendations read as follows:

> "11. Dealing first with the procedural issues raised by the Respondent, the Panel considered the contention that the appeal was not challenging an administrative decision by the Secretary-General but was requesting that the Secretary-General should take certain steps in connection with the G-to-P examination system. The Panel held that the rejections by the Secretary-General of Appellants' submissions in connection with the refusal to promote them without their passing the examination were administrative decisions, subject to appeal to the JAB.
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> 12. The Panel also rejected the contention that one of the claimants, Ms. Yacoumopoulou, no longer had standing to pursue the appeal because, since filing it, she had passed the G-to-P examination and had been promoted to the P-2 level. Yielding to the necessity of accepting what she could not change does not deprive her of the right to challenge the legality of that necessity. Moreover, as part of the appeal consists of challenging the bar to an application from a

General Service staff member for a P-3 post, for which she submits she is qualified, her present status does not affect her standing as a party to this appeal.

13. The Respondent had asked that the case of every Appellant in the group be dealt with on its own merits. The Panel, after examining the cases, came to the conclusion that the particular circumstances of any individual Appellant did not affect its recommendations, which related to all members of the group.

14. Turning next to what it considered the central issue of the case, the Panel expressed understanding for the view that the system of G-to-P examination was discriminatory in respect of a whole category of staff, namely, the General Service category, which, unlike others, was singled out by having to pass an examination in order to be promoted to a higher category. It was also discriminatory against women, who make up the majority of this category. However, the Panel found it difficult to brand the examination as illegal in view of the fact that it was the General Assembly which had introduced it and that its legality had been upheld by the UNAT (e.g., in Judgement No. 266, Capio). For that reason it was unable also to grant Appellants' request for monetary compensation. In light of objections to it by the staff, the Secretary-General had promised many times in the past to review the system. The Panel recommends that the Secretary-General carry out the undertaking given in these promises as soon as possible.

15. The Panel requested and received from the Respondent information on exceptions to the G-to-P examination and to the National Competitive Examination, on the number of posts available for promotion through the G-to-P examination and on the occupational groups covered by that examination. The Panel did not consider, however, that the information sought by the Appellants on the costs of the examination was relevant to the issues in the case and therefore did not request it.

16. From the answers by the Respondent to its questions, the Panel noted that there was no systematic approach to the G-to-P examination either in determining the area of occupation groups covered by the G-to-P examination in any given year or in determining the number of posts to be filled by successful candidates in the examination. The Panel further noted that often the job descriptions of G and P

posts differ very little and that the G-to-P examination does not allow evaluation of staff performance on the job or of performance at a higher level during mission assignments. The Panel recognized the need for the purpose and the procedure of the G-to-P examination to be made more transparent and therefore recommends that all available posts, including those at the P-2 level, should be advertised.

17. The Panel agrees with Appellants' contention, summarized above in paragraph 5(d), that any bar to taking the National Competitive Examination for posts in the P category based on age is discriminatory. In this context, the Panel referred to the National Competitive Examination held by the US government in 1992 where the age-limit was 35 for the P-2 examination and 39 for the P-3 examination. The Panel unanimously recommends that the Secretary-General should remove all age-limits in National Competitive Examinations for UN employment.

18. Regarding the argument by the Respondent that the Secretary-General was explicitly restrained by the General Assembly from making exceptions to the G-to-P examination as the only means of promotion to the P category, the Panel found that the restraint imposed did not prevent him from asking the General Assembly to approve exceptions, especially if they were presented as part of a comprehensive scheme. The Panel therefore recommends that the Secretary-General should submit such a scheme, detailing the exceptions he proposes as well as proposals for reform of the system".

On 18 February 1994, the Under-Secretary-General for Administration and Management informed the Applicants as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has noted the Board's conclusion that the G-to-P examination is not illegal in view of the fact that it was the General Assembly which introduced it and that its legality has been upheld by the U.N. Administrative Tribunal. He has also noted the Board's negative finding regarding your request for monetary compensation. The Secretary-General has therefore decided not to grant you the monetary compensation requested in your appeal and to take no further action in regard to your specific case.

The Secretary-General, however, has also noted the concerns expressed by the Board in regard to the G-to-P examination and the National Competitive Examination. Although the Board's recommendations on these subjects are of a policy nature, the Secretary-General has given them serious consideration and is requesting the appropriate offices to undertake a careful examination of the issues raised".

On 19 October 1994, the Applicants filed with the Tribunal the application referred to earlier.

On 1 May 1995, the Assistant Secretary-General for Human Resources Management announced a number of measures relating to the recruitment for posts at the P-2 and P-3 level and the P-2 and P-3 examinations, which would be open by invitation to qualified staff members in the General Service category meeting the entrance criteria applicable to external candidates, including age, education, experience and nationality requirements. With regard to short-term appointments at the P-2 and P-3 levels, extensions of the initial contract would be dependent on the incumbent passing this examination for the appropriate occupational group.

Whereas the Applicants' principal contentions are:

1. The Applicants should be considered for promotion to the Professional category on the basis of merit.

2. The system regulating promotions from the General Service to the Professional category, by competitive examination, is discriminatory in respect of the General Service category.

3. The competitive examination has been implemented in an unfair manner.

4. The Respondent has not proved to the Applicants' satisfaction that no persons have been exempted from the exam.

Whereas the Respondent's principal contentions are:

1. The G-to-P competitive examination was established on the basis of and in conformity with the applicable resolutions of the

General Assembly. The system forms part of the terms of employment of staff.

2. The G-to-P competitive examination is in accord with the Charter of the United Nations and its legality has been upheld by the Tribunal.

The Tribunal, having deliberated from 1 to 21 November 1995, now pronounces the following judgement:

I. This is an appeal filed jointly by thirteen staff members from a decision of the Secretary-General dated 18 February 1994, rejecting the claims by the Applicants that they were unlawfully required to adhere to the competitive examination procedure in order to be eligible for promotion to the Professional category. The decision took into account the recommendations of the Joint Appeals Board (JAB) which, though adverse to the Applicants with respect to the principal objective of their appeals, had urged further consideration regarding certain matters raised by the appeals. The Secretary-General, noting that the JAB recommendations were of a policy nature, stated that he had given them serious consideration and was requesting the appropriate offices to undertake a careful examination of the issues raised.

II. Since the JAB dealt with the cases in a single report because the basic issues raised were common, the Tribunal also will join the cases and dispose of them in a single judgement. All of the Applicants were staff members in the General Service category at the time they initiated their appeals. One was subsequently promoted to the P-2 level, after having passed a G-to-P examination, but for the purposes of this judgement will be considered on the same basis as the other Applicants.

III. The principal objective of the Applicants is, as they put it, to seek recognition of "their right to be considered for promotion to the Professional category on the basis of equity and merit." In essence, the contention advanced by the Applicants is that their rights as staff members have been infringed by their promotion to the Professional category being made dependent on passing the competitive examination established by the Respondent pursuant to General Assembly Resolutions.

IV. Although the Applicants disclaim any "intention at this point to assert that a specific General Assembly Resolution contravenes the Charter," in the view of the Tribunal, this disclaimer is, as a practical matter, contradicted by the substance of the appeals. For the Tribunal to hold that the Applicants can be promoted without passing the competitive examination would deny the General Assembly's power to mandate a competitive procedure, such as the examination, which the General Assembly itself has recognized as the response to its resolution. It would have to hold further that the Respondent acted unlawfully in implementing the General Assembly resolutions by establishing the competitive examination. As the JAB recognized, since the General Assembly introduced the system regulating promotion from the General Service category to the Professional category through the competitive examination and since the Tribunal had upheld the legality of the system in Judgement No. 266, Capio (1980), there is no valid basis for challenging its legality. It is thus untenable for the Applicants to maintain that they do not seek to overturn the action of the General Assembly on which the competitive examination is based.

V. The Tribunal has had a number of occasions to consider the competitive examination system, most recently in Judgement No. 694, Chen (1995), but has had no reason to question its legality or to

reconsider the Capio decision. The Applicants in this case briefly refer to Capio; they do not ask that it be reconsidered, and the Tribunal will not do so.

VI. Insofar as they deal with the circumstances of individual Applicants, these appeals focus on each of the Applicant's qualifications, experience and performance, arguing that they are of a high caliber and warrant consideration on merit among both internal and external candidates for vacancies in the Professional category. It appears that five of them took competitive examinations, and, in the one case noted above, a promotion to the Professional category resulted. The other four and those who did not take the exam do not raise any specific claim of non-observance of the requirements of the competitive examination. Rather, as they say in their application, the

> "... thrust of the present appeal is that the system regulating the movement from the General Service category to the Professional category is discriminatory vis-à-vis the General Service category as a whole. This category of staff, instead of being judged on merit for career opportunities, has been treated unequally by comparison to other categories of staff and external candidates. After the original General Assembly resolutions which first introduced the new way of movement from G to P through an exam, the administrative practice on this issue through the years has contravened the principle of equality."

The Applicants go on to say that their appeal

> "... points out faults of that system not only as described in ... ST/AI/268 ... but also as the system has been implemented, i.e. faults of the administrative practice in that regard. In this appeal the legality of ST/AI/268 and of the practice based on it is at stake."

VII. In furtherance of their general objective, the Applicants advance arguments of a policy nature. These aim at showing that the

competitive examination is unfair or discriminatory in certain respects and that it is not in the best interests of the Organization. Such arguments are addressed to the wrong forum. The specific requirements of the examination, such as the choice of occupational groups, or age requirements in national competitive examinations, are policy decisions by the Secretary-General made in the reasonable exercise of his discretion, based on his assessment of the staffing needs and objectives of the Organization. The Tribunal's function, as defined by its Statute, is to determine whether there has been non-observance of the terms of the employment contracts, which include the competitive examination. In these cases, the Tribunal can find no such non-observance since the competitive examination, as a whole, which is being challenged by the Applicants, is based on General Assembly resolutions and implementing administrative instructions. The goal of the Applicants is not to redress alleged violations of the system affecting them individually. They seek a fundamental change in the system as a whole, i.e. in the terms of their employment. But it is not the function of the Tribunal to substitute its views for those of the General Assembly or the Respondent on how best to manage the Organization.

VIII. Quite clearly, the General Assembly had a rational basis for requiring a competitive examination procedure for promotion from the General Service to the Professional category. Equally, the differentiation between various categories of staff, such as Professional, Field Service categories and General Service, has a rational basis. Moreover, the General Assembly could also reasonably take into account concerns regarding geographical distribution, which are inevitably involved in the filling of vacancies in the Professional category. The General Assembly, over

the years, has apparently not shared the policy objections now being asserted by the Applicants with respect to the Respondent's implementation of the system.

IX. The Respondent has stated, in the decision dated 18 February 1994, that he is undertaking an examination of the issues raised by the JAB recommendations. The Tribunal notes, in this regard, the introduction of measures outlined in a memorandum dated 1 May 1995, from the Assistant Secretary-General for Human Resources Management, which address some of the concerns raised by the Applicants. If the Applicants are dissatisfied either with the pace, the scope, or the outcome of the Respondent's examination, they are at liberty to submit their views to the Secretary-General as to the need for and nature of any legislative change in the system that they advocate. It is not for the Tribunal to legislate changes in a lawful system established by the General Assembly.

X. The General Assembly has the power to promulgate conditions of service for the staff. The International Court of Justice has so held in its advisory opinion of 20 July 1982, Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 325, paragraph 68. The view of the ICJ is entirely consistent with that previously indicated by the Tribunal in Capio. The Tribunal has also held that General Assembly Resolutions are part of the conditions of service that bind the staff. The Tribunal considers that, since the competitive examination places no improper restriction on the eligibility of any staff member for the competitive examination, it raises no questions under Article 8 of the Charter. The Tribunal likewise sees no conflict between the competitive examination system and Article 101 of the Charter since the obvious purpose of a competitive examination is to seek the best qualified of the candidates being examined.

XI. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary